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PP v. ASMARANI GHAZALI

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
ZABARIAH MOHD YUSOF JCA
RAVINTHRAN PARAMAGURU JCA
B [CRIMINAL APPEAL NO: N-05(H)-492-10-2018]
26 DECEMBER 2019

CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Offence of child abuse – Causing death of child – Plea of guilty – Whether sentence of 18 months imprisonment manifestly inadequate – Causing child to choke to death by putting chilli inside child's mouth – Whether deliberate act – Whether act of showing chilli to child before putting into child's mouth was to create fear – Whether form of abuse – Whether remorse shown by accused justified sentence of 18 months imprisonment – Whether sentence ought to reflect gravity of offence – Whether sentence ought to be substituted – Child Act 2001, s. 31(1)(a)*

The respondent had been entrusted with the care of the child ('deceased'), aged two years and seven months. On 13 June 2018, the deceased, who was not well at the material time, was sent to the respondent's house together with his brother. While there, the deceased cried continuously and when the respondent's attempts to stop the deceased from crying failed, the respondent showed a green chilli to the deceased to scare the deceased. When the deceased continued crying, the respondent popped the green chilli into the mouth of the deceased when his mouth was gaped open as he was crying. This caused the deceased to have difficulty to breathe. The respondent tried to give some water but the deceased could not swallow the water and was hence, rushed to the clinic and subsequently to the hospital. The deceased passed away despite the attempts to treat him. The post mortem report showed that the cause of death was choking due to his air well being blocked by chilli. The respondent was charged under s. 302 of the Penal Code and an alternative charge under s. 31(1)(a) read together with s. 31(5)(b) the Child Act 2001 ('the Act'). The respondent pleaded guilty under the alternative charge and was thus convicted and sentenced to 18 months imprisonment by the High Court. This was the prosecution's appeal against the inadequacy of the sentence.

Held (allowing appeal; substituting sentence of 18 months imprisonment to ten years imprisonment)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) Malaysia enacted the Act to fulfil its obligation under the Convention of the Rights of the Child 1989 so as to protect the welfare of children below 18 years of age. The charge against the respondent was 'abusing' by putting chilli in the mouth of the deceased which led to his death. The word 'abuse' means a violation of an individual's human and civil rights

by any other persons. 'Child abuse' is any act of commission of commission by a parent or guardian or any other person which would endanger or impair the child's physical or emotional wellbeing or that judged by a mixture of community values and professionals as being inappropriate. (paras 24 & 25)

(2) The Act deals specifically with ill treatment, neglect, abandonment or exposure of children by persons having the care of the child. Children, being vulnerable and defenceless, as they are very young, require society to safeguard their interest. Parliament manifested its intention as to the seriousness of child abuse when it amended s. 31 of the Act in 2015, to provide for heavier penalty for those who are found abusing, exploiting or neglecting children. (paras 34 & 35)

(3) Although the act of the respondent which resulted in the death of the deceased was unfortunate, it was a deliberate act on the part of the respondent. The act of putting chilli in the mouth of the deceased while his mouth was gaped opened crying was an act to cause pain and suffering. The court took judicial notice chillies are 'hot', which gives a burning sensation to the palate, even to the adult, what more to a child. Even though it was not established as to why the respondent had earlier kept showing the chilli to the deceased when he continued crying, but in all probability, it was to create fear on the deceased that if he refused to stop crying, the respondent would use the chilli on the deceased. Creating an inexplicable fear, was a form of abuse on the deceased. (paras 31 & 32)

(4) The respondent, having been entrusted with taking care of children, should be aware that children, being what they are, needed care and attention especially at the time when they are not well, when they are most clingy and whinny. A reasonable person, more so, the respondent, who happened to be a mother in her own right ought to know better that when something is put into the mouth of a crying child, the child could choke to death. These facts were not considered by the High Court Judge ('HCJ') in imposing the sentence against the respondent. The HCJ was swayed by the remorse of the respondent as justification for not imposing long imprisonment sentence and hence had erred in failing to carry out the balancing exercise between the public interest and the interest of the respondent. (paras 32 & 36)

(5) The full weight of the law should come down on those who deliberately caused harm to the child, especially one who was a child minder and one that leads to death. The sentence must therefore reflect the seriousness and gravity of the offence and it must convey to the public, more so, parents, guardians and child minder, not to take safety and welfare of children lightly. A sentence of 18 month was certainly not proportionate

A to the gravity of the offence and would not serve as a deterrent to would be offenders. In the circumstances, the sentence imposed by the HCJ was set aside and substituted with an imprisonment sentence of ten years. (paras 37 & 38)

Case(s) referred to:

B *Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC* ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***

Legislation referred to:
Child Act 2001, s. 31(1)(a)
Penal Code, s. 302

C *For the appellant - Mohd Zain Ibrahim; DPP*
For the respondent - Hanif Hassan; M/s Hanif Hassan & Co

[Editor's note: Appeal from High Court, Seremban; Criminal Trial No: NA-45B-11-08-2018 (overruled in part).]

D *Reported by S Barathi*

JUDGMENT

Zabariah Mohd Yusof JCA:

E **[1]** This is an appeal by the prosecution (appellant) against sentence which was imposed on the accused (respondent) by the learned High Court Judge.

[2] The respondent was charged under s. 302 of the Penal Code and an alternative charge under the Child Act 2001 (the Act) in the High Court. The respondent pleaded guilty to the alternative charge under the Act which reads as follows:

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> Bahawa kamu pada 13 Jun 2018, antara jam lebih kurang 9.30 pagi hingga 10.00 pagi, di rumah alamat No. 27, Jalan TTJ 3/1 B, Taman Tuanku Jaafar, Sungai Gadut, Seremban, Negeri Sembilan, telah menganiayai Muhammad Afif bin Kamarol Azli (No K/P: 151126-05-0379 dengan cara
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> G memasukkan sebiji cili berwarna hijau ke dalam mulut sehingga menyebabkan kematian, dengan itu kamu telah melakukan kesalahan di bawah seksyen 31(1)(a) Akta Kanak-Kanak 2001 dibaca bersama seksyen 31(5)(b) Akta Kanak-Kanak 2001 dan kamu boleh dijatuhkan hukuman seperti yang diperuntukkan di bawah seksyen 31(1) Akta Kanak-kanak 2001.

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[3] The respondent pleaded guilty to the alternative charge when it was read to her and the learned High Court Judge convicted and sentenced her to 18 months jail term from the date of arrest on 21 June 2018.

[4] The appellant appealed to the Court of Appeal against sentence
I imposed by the learned High Court Judge as being manifestly inadequate, which is the appeal before us.

[5] After hearing oral submissions and perusing through the written submission of both parties, we agreed with the appellant that the sentence imposed by the learned High Court Judge was indeed manifestly inadequate. We therefore allowed the appeal by the prosecution, and set aside the sentence imposed by the learned High Court Judge and substituted the sentence to an imprisonment term of ten years.

[6] Hereinbelow are our reasons for deciding so.

Background

[7] The respondent was entrusted with the care of a child by the name of Muhammad Afif bin Kamarol Azli (the deceased) by the mother of the deceased whilst she was at work. The deceased was about two years seven months old at the material time.

[8] On 13 June 2018 at or around 8am the mother of the deceased had sent the deceased and his brother to the house of the respondent as usual. There was a sense of reluctance on the part of the deceased in going to the respondent's house. However, the mother of the deceased still sent the deceased to the respondent. The facts showed that the deceased was not well at the material time.

[9] At around 9am, as the respondent was giving food to one of the babies which was under her care, the deceased cried. Despite giving toys to pacify him, the deceased still continued whining and crying (merengek-rengek dan menangis).

[10] The respondent told the deceased to throw away his soiled diapers into the dustbin in the kitchen. After doing as he was told, the deceased was still whining and crying as he was unwell.

[11] The deceased then came over to the respondent while crying very loudly. The respondent told him not to cry, however it was to no avail. In her attempt to stop the deceased from crying, the respondent went over to the kitchen and opened the refrigerator, where she got a green chilli and showed (mengacah-acah) to the deceased the green chilli. However, the deceased still continued crying loudly. The respondent then popped the green chilli into the mouth of the deceased when the mouth of the deceased was gaped opened as he was crying.

[12] Subsequently, the respondent saw the deceased had difficulty in breathing. The respondent gave some water to the deceased to drink, however the deceased could not swallow the water.

[13] The respondent then asked her child to wake up her husband to bring the deceased to the clinic. On the way to the clinic, the respondent attempted to help the deceased to breathe. The respondent brought the deceased to

A Klinik Baiduri, however as the clinic did not have any oxygen, the deceased was then brought to Radhiyah Klinik. There, the doctor at the clinic tried to treat the deceased and asked her staff to contact 999 but they took some time to come. The staff at the clinic advised the husband to the respondent to send the deceased to the hospital.

B **[14]** The husband to the respondent drove the deceased to Hospital Tuanku Jaafar, Seremban. On the way to the hospital, the respondent has asked her child to contact the mother of the deceased but her phone went unanswered. Subsequently, the mother of the deceased called back the respondent and the respondent told the mother of the deceased to go to the emergency C department of Hospital Tuanku Jaafar, Seremban. However, the deceased subsequently passed away despite attempts were made to treat him.

[15] From the facts, P4 which was admitted by the respondent, the respondent had admitted to one police officer, ASP Razimah binti Razali that on the day of the incident at around 9am the respondent had put chilli into D the mouth of the deceased.

[16] The post mortem report, P5 showed that the cause of death was choking due to air well being blocked by chilli.

Issue

E Whether the sentence of 18 months imposed by the learned High Court Judge was manifestly inadequate?

Submission By The Appellant

[17] It was the submission by the appellant that the sentence imposed by F the learned High Court Judge was manifestly inadequate as compared to the maximum imprisonment sentence that is provided by the section, which is 20 years imprisonment sentence.

[18] It was submitted that the learned High Court Judge had erred when he failed to consider the public interest and the facts which call for a deterrent G sentence.

The Findings Of The Learned High Court Judge

[19] It is the learned High Court Judge's findings that the respondent had been taking care of the deceased well. The learned High Court Judge's H findings were premised on the fact that the mother to the deceased did not wish to change to another childminder although the respondent did tell the mother of the deceased not to send the deceased to her house anymore. In addition, the relationship between the brother of the deceased and the respondent's family was close.

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[20] It is most unfortunate that the incident happened and it cannot be said that the respondent had the intention to cause death to the deceased. The death was caused due to the momentary foolishness of the respondent and that she did not anticipate that such act would have caused death to the deceased.

[21] The plea of guilt by the respondent shows that the respondent had been remorseful as to what had happened and it had saved the court's time if it were to go on for full trial.

[22] The learned High Court Judge also took into account the seriousness of the offence and that an appropriate sentence ought to be imposed and justice ought to be accorded to the mother of the deceased. The learned High Court Judge also took into account the impact statement of the mother to the deceased in P7. In closing his grounds, the learned High Court Judge said this:

> Tidak sesiapa yang mendapat faedah jika OKT di penjara lebih lama. Beliau sendiri mempunyai tiga orang anak, yang bongsu berumur tiga tahun.

Our Findings

[23] Section 31(1) of the Child Act 2001 provides that:

> 31. (1) any person who, being a person having the care of a child:
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> (a) abuses, neglects, abandons or exposes the child or acts negligently in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned or exposed; or
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> (b) sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both.

[24] Given that the charge against the respondent is under the Child Act 2001, it is of paramount importance that the intention of the enactment of the same be taken into account when imposing sentence. Malaysia has enacted the Child Act 2001 to fulfil its obligation under the Convention of the Rights of the Child 1989 (CRC) so as to protect the welfare of children below 18 years of age. With the introduction of the Child Act 2001, the Juvenile Courts Act 1947, the Women and Girls Protection Act 1973 and the Child Protection Act 1991 were repealed.

[25] The charge against the respondent is "abusing" (menganiayai) by putting chilli in the mouth of the deceased which led to his death.

The word "abuse" means a violation of an individual's human and civil rights by any other person.

A "Child abuse" is any act of commission or commission by a parent or guardian or any other person which would endanger or impair the child's physical or emotional wellbeing or that judged by a mixture of community values and professionals as being inappropriate.

B **[26]** With these aforesaid backgrounds at the back of our mind, we then moved on to consider the sentence which was imposed by the learned High Court Judge.

[27] In deciding as to what ought to be the appropriate sentence to be imposed, we are guided by the principles of sentencing as enunciated by the C case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 whereby the court held that:

> The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed D on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

E **[28]** Further illumination in the principles of sentencing can be found from the wise words of Azlan Shah LP (as he then was) in *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1981] 1 MLRA 304 at p. 305 where His Lordship said:

> F Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned Judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a G right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinion as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that H reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere I with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

[29] We took note of the fact that the learned High Court Judge did consider the issue of public interest, the seriousness of the offence, plea of guilt, the fact that the respondent was remorseful of her act and that there was no intention to cause death to the deceased. However, we found that such mention of the factors by the learned High Court Judge was merely lip service which did not translate into the appropriate sentence that ought to be imposed on the respondent so as to commensurate with the offence committed.

[30] True as what had been said by the learned High Court Judge that the incident was most unfortunate, however, he seriously erred when he said that no one benefited if the respondent is to be committed to prison. Imprisonment sentence cannot be viewed at, in that light. We also accept the fact that the respondent has children of her own. But that cannot be a factor to absolve her from being imposed with the appropriate sentence.

[31] Although the act of the respondent which resulted in the death of the deceased was unfortunate, to say the least, but from the facts, it was a deliberate act on the part of the respondent. The act of putting chilli into the mouth of the deceased while his mouth was gaped opened crying is an act to cause pain and suffering. We take judicial notice that chillies are "hot", which gives a burning sensation to the palate, even to an adult, what more to a child. The facts showed that initially, the respondent kept on showing the chilli ("mengacah-acah") to the deceased. What was the intention of the respondent in doing that? Was it to threaten the deceased that she would use the chilli on him if he would not stop crying? Was it to create fear on the deceased, so that when the deceased feared that the chilli would be used on him, he would stop crying? When that attempt failed, the respondent put the chilli into the deceased's throat, while his mouth was gaping crying. One would not need to be a rocket scientist to guess the likelihood what it would cause to a child who was in the midst of crying, of such an act on the part of the respondent.

[32] Although it was not established, as to why the respondent had earlier kept showing to the deceased the chilli when he continued crying, but in all probability, it was to create fear on the deceased that if he refused to stop crying, the respondent would use chilli on the deceased. Creating an inexplicable fear, to our mind is a form of abuse on the deceased. Threats or acts that induce fear on a child are aspects of emotional abuse. How devastating can it be on the parents of the deceased. The deceased, who was a child barely three years old who was unwell at the material time who needed extra care and attention, that was the reason why he went to the respondent crying loudly more so, hoping for some sympathy as he was simply not well at the material time. But what was the reaction that he received from the person who was supposed to be entrusted to take care of him?

The respondent did not bother to find out what was wrong but "mengacah-acah" the chilli on the deceased and finally put the "acah-acah" into action and which ended his life. For mothers, more so, the respondent who appeared to be entrusted with taking care of children, including her own, should be aware that children, being what they are, needed care and attention especially at the time when they are not well, when they are most clingy and whinny. A reasonable person, more so, the respondent, who happened to be a mother in her own right ought to know better that when you put in something into the mouth of a crying child, the child could choke to death. Even doing such thing to an adult could invite severe consequences, what more a child who was barely 3 years old! These are facts which were not considered by the learned High Court Judge when he imposed the sentence against the respondent. Therefore, the learned High Court Judge had erred when he made findings at para. [10] in his grounds that:

> ini lebih merupakan perbuatan OKT yang tidak menghargai bahawa kematian boleh terjadi kerana perbuatan beliau. **Beliau tidak menyangka cili tersebut akan tersekat di kerongkong mangsa**.
>
> (emphasis added)

[33] The learned High Court Judge said that long imprisonment sentence on the respondent would not benefit anybody, especially when the respondent herself has three children of her own. This is where the issue of public interest comes into play, and the learned High Court Judge had erred in his application of this principle. When dealing with the issue of public interest, we have to take into account the balancing aspect of the interest of the accused person and the interest of the public.

[34] In considering the issue of public interest, it is of paramount importance that the intention of Parliament be looked into when legislating the Act. The Act deals specifically with ill-treatment, neglect, abandonment or exposure of children by persons having the care of the child. Children, being vulnerable and defenceless as they are very young, require society to safeguard their interest. Therefore, it is for the custodian of children designated by law as protectors and enforcers to use and apply the Act to protect them.

[35] Parliament manifested its intention as to the seriousness of child abuse when it amended s. 31 of the Act in 2015, to provide for heavier penalty for those who are found abusing, exploiting or neglecting children. The penalty was increased from RM20,000 to RM50,000 and the maximum imprisonment sentence was increased from ten years to 20 years. This again was not considered by the learned High Court Judge.

[36] The learned High Court Judge was swayed by the remorse of the respondent as a justification for not imposing long imprisonment sentence. The learned High Court Judge appeared to be overly sympathetic on the respondent without considering the devastating effect on the parents due to the loss of their child, the deceased which they have entrusted to be under

the care of the respondent. The impact statement P7 is testimony to this. Clearly the learned High Court Judge erred in failing to carry out the balancing exercise between the public interest and the interest of the respondent.

[37] Such stance by the learned High Court Judge, failed to take into account the intention of Parliament when it enacted the Act. We would be failing in our duty too, if we are to agree with the learned High Court Judge with the sentence imposed, which was manifestly inadequate. The abuse of children especially one that leads to death needs to be dealt with accordingly. Although we do not question the choice by the prosecution under which law to prefer charges against an accused person, but the effect of the act of the respondent has caused death to a child. The respondent may have misjudged her act as it was submitted by counsel that she did not intend to cause death, however, when dealing with children, there can be no room for error or failure with a child, as the consequences are dire, as can be seen in the present case. Children are vulnerable and defenceless and require society and the law to safeguard their interests, which cannot be trampled upon or simply be ignored at the expense of a mistake/misjudgment by some adult. The full weight of the law should come down on those who deliberately cause harm to the child, especially one who was a childminder and one that leads to death. The sentence must therefore reflect the seriousness and gravity of the offence and it must convey to the public more so, parents, guardians and childminders not to take safety and welfare of children lightly. A sentence of 18 months is certainly not proportional to the gravity of the offence and would not serve as a deterrent to would-be offenders.

[38] Given the aforesaid, we allowed the appeal by the appellant and set aside the sentence imposed by the learned High Court Judge and substituted it with an imprisonment sentence of ten years.